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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73 - 5993

JOHN E. TEST, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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December 24, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The Petitioner John E. Test respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 1, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Colorado.

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Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 1, 1973. A timely petition for rehearing was denied on November 26, 1973, and this petition for writ of certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., require that a defendant be provided access to jury lists and other jury records upon the filing of a sworn statement in compliance with 28 U.S.C. § 1867(d) in support of a motion to quash the jury and upon the presentation of a prima facie claim of constitutional dimension, i.e., the systematic exclusion of Mexican-Americans from the jury array?

2. Does the concept of Due Process require that upon the presentation of a constitutional claim of systematic exclusion from the jury array of Mexican-Americans, a defendant be afforded a hearing on this claim, and does the concept of Due Process require the Government to bear the burden of explaining away this prima facie claim?

3. Must a trial judge respond with concrete, direct answers to queries from the jury during its deliberations when the jury makes clear that it is confused concerning the law to be applied to the case it is considering?

4. Should a mistrial be declared when the prosecutor makes comments in his closing argument concerning other crimes and the consequences of acquitting a defendant, and when he comments on the veracity of the defendant?

Statutory Provisions Involved

United States Code, Title 21, Section 841(a)(1), provides in pertinent part:

> "(a) Unlawful acts.
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally
> (1) to manufacture, distribute, or dispense, a controlled substance."

United States Code, Title 28, Section 1867(a), (d), and (f) (see Appendix, p. 12)

Statement of the Case

Petitioner was charged in a one-count indictment filed in the District Court for the District of Colorado with having distributed lysergic acid diethylamide (L.S.D.) in violation of 21 U.S.C. § 841(a)(1). Following a trial to a jury of twelve, Petitioner was found guilty and was sentenced to imprisonment for eighteen months. Upon direct appeal pursuant to 28 U.S.C. § 1291, the Court of Appeals

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for the Tenth Circuit affirmed the judgment of the district court.

The Government relied at trial upon the testimony of I. H. Allen, an undercover agent for the Bureau of Narcotics and Dangerous Drugs. He testified that he had met Petitioner through a Peter Brophy, and that he had been falsely introduced as a ski instructor and a former associate of Brophy's in the importation of marajunana from Mexico into California. He attempted to convince Petitioner to secure him cocaine, and when this failed, he asked for other drugs and showed Petitioner a large amount of money -- either fifteen or fifty thousand dollars. Finally the Petitioner sold Allen one thousand tablets of suspected mescaline. These turned out, upon analysis, to contain L.S.D. rather than mescaline.

Petitioner relied at trial upon the twin defenses of entrapment and lack of intent to distribute L.S.D. It was established that Brophy was a Government informer, that he had built up a friendship of several months' duration with Petitioner, and that he had regaled Petitioner with stories (apparently false) of his high adventure in the drug trade and great profits. Petitioner contended that it was only because of Brophy's friendship and the constant prodding of agent Allen that he had given Allen the drug in question. He made a profit of fifty dollars on the transaction. He also testified that he had thought that the tablets which he purchased and turned over to Allen contained mescaline rather than L.S.D. He

had even tested the tablets to make sure of this, for he did not want to give anyone L.S.D., for he felt the latter was a dangerous drug and he had had a bad experience with it in college. The Court of Appeals held that neither of these defenses had been established as a matter of law, and that there was sufficient evidence to support the jury's verdict. See pp. 6, 9-10 of Appendix hereto.

During its deliberations below, the jury sent several notes to the trial court. One inquired whether L.S.D. and mescaline were interchangeable for purposes of conviction, and the second asked whether Brophy could be considered a Government agent in regard to the entrapment issue. The trial court refused a suggestion by defense counsel to reply to the first query that the two substances were not interchangeable, and instead the court told the jury that its question could not be answered. In reply to the second question, the court instructed the jury to rely on its memory of the evidence and the court's prior instructions, though the latter had contained no reference to Brophy. Petitioner contended that these responses were misleading and erroneous, but the Court of Appeals, without addressing the issue directly, held it to be of "no merit." See p. 10 of Appendix hereto.

During his closing argument to the jury, the attorney for the Government made reference to the implications of finding the Petitioner not guilty; he also referred to crimes such as murder and hijacking, and he told

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the jury that the Petitioner had lied when he had testified. Petitioner contended below that these comments were highly prejudicial and improper, but the Court of Appeals, again without addressing the issue directly, disagreed. See p. 10 of Appendix hereto.

Prior to the trial below, Petitioner filed through counsel a motion to dismiss the inductment because of the systematic exclusion of certain cognizable groups -- Mexican-Americans, blacks, students, and persons under the age of thirty-five -- from the master and qualified jury wheels in the district court. Accompanying this motion was a motion to inspect the jury lists, and an affidavit presenting factual statements of such discrimination. The district court denied these motions, though it acknowledged that Mexican-Americans were significantly underrepresented on the district court's jury array. Petitioner contended that he had made a valid constitutional attack and that he had complied with the requirements of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq. The Court of Appeals, again without comment, affirmed the district court's denial both of access to the critical jury lists as well as the denial of a hearing on the motion to dismiss the indictment. See p. 10 of Appendix hereto.

Reasons for Granting the Writ

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS WITH RESPECT TO THE MEANS FOR CHALLENGING A JURY.

The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., provides a statutory method for challenging a jury array. See p. 12 of Appendix hereto. Briefly, the requirements of the Act are that (1) a motion must be filed prior to the voir dire examination of the prospective jurors, and (2) this motion must be accompanied by a sworn statement of facts, which if true, would constitute a failure to comply with the provisions of the Act. 28 U.S.C. § 1867(a) and (d). Upon the presentation of such a statement, a defendant is to be given access to the relevant jury documents which are not otherwise avail le to the public. 28 U.S.C § 1867(d) and (f). Petitioner's counsel herein complied with these requirements for he filed both a motion to dismiss the indictment and/or quash the array, in which he alleged that certain cognizable groups were systematically excluded, and he accompanied this motion with an affidavit showing that the Plan for Jury Selection utilized by the district court resulted in the gross underrepresentation of Mexican-Americans and persons under the age of thirty. (See the Record on Appeal, vol. II, p. 26-31 and p. 13-14 of Appendix hereto.) This affidavit contained a statistical analysis of one of the five primary counties which constituted the pool from which persons were drawn for the array in the district court. Despite this presentation, the district court denied both the motion to inspect the jury records as well as the motion to dismiss the indictment and/or the array. In so doing,

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the district court acknowledged that Mexican-Americans were significantly underrepresented in the array, but the court denied counsel both an opportunity to inspect the relevant documentation, and the court additionally prevented counsel from having a hearing on Petitioner's motion to dismiss the indictment and/or quash the array. (See Record on Appeal, Supp. vol. II, p. 13-14, 17-18.) The Court of Appeals did not address this issue in its opinion other than to note that it considered the issue to be without merit. See p. 10 of Appendix hereto.

The decision below is thus in conflict with decisions of other circuits. The Ninth Circuit has stated in United States v. James, 453 F.2d 27 (9th Cir. 1971) that a sworn statement must be filed under 28 U.S.C. § 1867(d). In another decision from the same court, the requirement of a sworn statement was bypassed because defense counsel had orally articulated his grounds for his motion at the time of argument before the district court; additionally, the Government did not object to the lack of such statement. United States v. Ware, 473 F.2d 530 (9th Cir. 1973). Still a third decision, United States v. Beaty, 465 F.2d 1376 (9th Cir. 1972), allowed discovery of the jury records without the filing of a sworn statement. Here counsel filed an affidavit which clearly conformed to the requirements of the Act, and yet discovery of the jury records was still not allowed.

More importantly, it was argued below not just that the Plan for Selection resulted in a jury array that did not conform to the requirements of the Act, but also

that the array was selected in a means that denied Petitioner his constitutional right to a jury drawn from a fair cross-section of the community. Thiel v. Southern Pac. Co., 328 U.S. 217 (1946). The Jury Selection and Service Act provides that failures to comply with the methods set out in § 1867 do not bar constitutional challenges to the jury array. See the House report to § 1867, which states that § 1867 was not intended to "preclude any person or the United States from asserting rights created by other statutes or for enforcing constitutional rights." 1968 U.S. Code Cong. & Admin. News 1806. Thus, even assuming arguendo that the affidavit filed by Petitioner's counsel in apparent compliance with § 1867 was not sufficient, a prima facie constitutional challenge was made when the trial court acknowledged that Mexican-Americans were significantly underrepresented in the jury array of the district court.[1] Once this prima facie claim was

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[1]At the hearing on Petitioner's motion to inspect the jury records, the district judge said:

> "I concede to you, Mr. Gerash, that there are not--the percentage of Chicanos selected for jury service under the system that we utilize is less than the population of the Chicano people in any given county -- I wouldn't say in any given county, but in most, so we concede that. We are starting with that, so what you are looking at, the master jury wheel will prove. It will prove what we concede, so the record shows that. ...
>
> "You are not going to have a hearing in this case. If you want to look at the jury list some time, we will hire some extra help and you come down and you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that. (Record on Appeal, Supp. vol. II, p. 13-14, 17.)

Despite this acknowledgment, the trial court denied all motions with respect to the jury, without a hearing. (Record on Appeal, Supp. vol. II, p. 17, 18.)

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made out, it was error to deny access to the jury records and to deny a hearing on the motion to dismiss and/or quash. The Court of Appeals for the Fifth Circuit has recently faced this exact issue in United States v. De Alba-Conrado, 481 F.2d 1266 (5th Cir. 1973). There counsel for the defendant waited until the jury had already been empanelled and sworn before asserting a challenge to the array on the basis of the exclusion of persons with Latin surnames. The trial court there denied the motion but invited defense counsel to renew the motion after trial, if necessary. No renewal was made and this point was not raised in defendant's motion for a new trial. The Fifth Circuit therefore held that any statutory challenge to the array had been waived by failing to comply with the timeliness requirements of 28 U.S.C. § 1867(a). However, the Fifth Circuit held that the challenge made had significant constitutional implications to require remand. 481 F.2d at 1270. In addition, the court stated that the defendant on remand should be given a complete and fair review of his contentions, and the court reaffirmed the following statement made in Mobley v. United States, 379 F.2d 768, 773-774 (5th Cir. 1967):

> "We believe the District Judge erred, therefore, in not permitting inspection of the questionnaires. This evidence, designed to show the ratio of Negroes to whites on the jury lists, is pertinent to an inquiry into the question of whether there has been a systematic exclusion of Negroes because of race. While this proof is not necessarily controlling, it is, nevertheless, an important factor of

> substantial value and should be considered by the Court in connection with other evidence pertaining to the method of selection of persons on the jury lists. Confidentiality of the jury questionnaires must accordingly yield to this major consideration."

The Court of Appeals for the Second Circuit has ruled in United States v. Guzman, 468 F.2d 1245 (2d Cir. 1972), that no discovery or hearing were necessary. However, that case involved a challenge based upon the alleged underrepresentation of persons between the ages of 24 and 30 and the total exclusion of 18-20 year old persons. The Second Circuit found that such challenges, even if true, were insufficient under the Act, and were not of constitutional dimension. The instant case, however, involves a clear constitutional claim of exclusion of an ethnic group, Hernandez v. Texas, 347 U.S. 475 (1954), and therefore the Guzman rationale for denying discovery and a hearing cannot apply.

Inasmuch as a prima facie showing of unconstitutional exclusion of Mexican-Americans was shown,[2] it was error both to deny counsel an opportunity to inspect the pertinent jury records and also to deny Petitioner a hearing on his motion to dismiss the indictment and/or quash the array.

In addition, the trial court was apparently

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[2]It was never doubted or challenged below that Chicanos, or Mexican-Americans, constituted a separately identifiable ethnic group. Cf. Hernandez v. Texas, supra; Muniz v. Beto, 434 F.2d 697, 701 (5th Cir. 1970).

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under the impression that it was Petitioner's burden to demonstrate the systematic exclusion of a cognizable group (though it is unclear how such proof is to be accomplished if access to the jury records is denied). However, decisions of this Court and of the courts of appeals make clear that once a prima facie claim of constitutional dimension has been established, the burden shifts to the Government to explain away, if possible, the exclusions in question. Alexander v. Louisiana, 405 U.S. 625, 631-632 (1972); cf., United States v. Williams, 421 F.2d 529, 531 (8th Cir. 1970); Black v. Curb, 464 F.2d 165, 168 (5th Cir. 1972); Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971); Smith v. Yeager, 465 F.2d 272 (3d Cir. 1972).

Because of the importance of the questions of the right to trial by a jury drawn from a cross-section of the community and how to secure such right, and because of the conflict with decisions of other courts of appeals and this Court, this Court should grant the writ to review the judgment below.

2. THE DECISION BELOW IS IN CONFLICT WITH A DECISION OF THIS COURT CONCERNING THE REINSTRUCTION OF THE JURY.

During its deliberations below, the jury sent out six notes of inquiry to the trial court. Only the responses to two of these notes were challenged below by Petitioner. One inquiry concerned whether L.S.D. and mescaline were interchangeable for purposes of conviction.

The trial court initially proposed to answer that they were not, but that both were Schedule I controlled substances. When Petitioner's counsel requested that only the first part of the proposed answer be given, the trial court instead informed the jury that its question could not be answered. (Record on Appeal, Supp. vol. I, p. 50, 55.) The second query related to Peter Brophy's status in relation to the entrapment issue, namely, whether he could be considered a Government agent. The court's instructions had not referred to Brophy, but had merely briefly mentioned Government "officers" or "agents." (Record on Appeal, Supp. vol. I, p. 40, 41.) The trial court agreed that the evidence was undisputed on this point, but the judge felt that he had covered the issue adequately in his instructions. The court therefore told the jury that it would have to rely on its memory of the evidence and the instructions already given. (Record on Appeal, Supp. vol. I, p. 58.) Petitioner contended below that these failures to alleviate the jury's problems necessitated reversal under this Court's decision in Bollenbach v. United States, 326 U.S. 607 (1946). The Tenth Circuit did not address itself directly to this issue in its opinion below, but instead merely found it to be without merit. See p. 10 of Appendix hereto.

Bollenbach was a case involving a prosecution for transporting securities in interstate commerce knowing them to have been stolen, and for conspiracy to commit such offense. After the jury had been in deliberation

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for seven hours, it sent out a note asking in effect whether a conspiracy could continue after the object of the conspiracy had been completed. The trial judge gave an unresponsive answer, and the jury sent out a second inquiry concerning the effect of knowledge that the bonds in question were stolen. The trial judge responded with an instruction that possession of stolen property in a state other than that in which they had been stolen raises a presumption that the possessor both stole the securities and transported them in interstate commerce. The Second Circuit found this instruction to be highly erroneous, but nonetheless sustained the conviction on a theory of accessory after the fact, even though the defendant had not been charged with such an offense. The Government argued before this Court that the instruction given by the trial judge was merely a "cursory, last minute" instruction on the question of the necessity of knowledge of the stolen character of the securities. This Court, per Justice Frankfurter, held that particularly since the instruction was a "last minute" one, the duty of the trial judge was made all the greater.

> "Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge. * * *
>
> "Discharge of the jury's responsibility for drawing appropriate con-

> clusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. But he was not even 'cursorily' accurate. He was simply wrong." 326 U.S. at 612-613.

This Court further held that the jury could not be expected to ignore bad law if such were given to it by the court, and while the evidence against the defendant was strong, this Court said that

> "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." 326 U.S. at 614.

In the instant case, both of the jury's inquiries concerned vital issues in the case. One concerned the entrapment issue, and the other the question of intent. In regard to the entrapment question, the judge did not question but that Brophy was a Government agent. The Government argued below that since it was unclear from the record exactly when Brophy became a Government informer, it was proper for the trial court to refuse to instruct the jury on this question. However, it was clear that Brophy was in the employ of the Government, and he played an integral role in the dealings with the Petitioner. It was Brophy himself who testified that he and agent Allen were

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interested in Petitioner only because they thought he might know some "big dealers," though Petitioner himself was of no importance. (Record on Appeal, vol. I, p. 110.) Because of this, the Government cannot disavow Brophy and say that he was not an agent. Sherman v. United States, 356 U.S. 369, 373-375 (1958); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); United States v. Place, 263 F.2d 627 (2d Cir. 1959). Similarly, with respect to the question of intent and whether mescaline and L.S.D. were interchangeable, the trial judge's response was equally vital. Other courts have held in the context of the offense of fraudulently and knowingly importing a narcotic drug that the knowledge of the nature of the drug was crucial. United States v. De La Cruz, 420 F.2d 1093 (7th Cir. 1970); United States v. Christmann, 298 F.2d 651 (2d Cir. 1962). Nonetheless, the trial judge failed to give a meaningful response to either of these questions. The trial judge therefore clearly failed to fulfill his duty of "clearing away" the jury's difficulties. Bollenbach v. United States, supra, at 612-613.

In a similar context, the Court of Appeals for the Ninth Circuit has held that plain error occurred when a trial judge did not give a sufficient answer to a jury's inquiry. Powell v. United States, 347 F.2d 156 (9th Cir. 1965). The Ninth Circuit there said:

> "It is no answer to say that the supplemental instruction was correct, so far as it went; or that it was to be read in the light of the original instructions and that

> these fairly presented the issues. The ultimate question is 'whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors.' (citations omitted) As we have noted, the jury's inquiry showed the initial charge left the jury confused. A rereading of a portion of that charge which was not clearly responsive to the jury's inquiry could scarcely have clarified the matter in the juror's minds. Clear error occurred, requiring reversal." 347 F.2d at 158 (footnotes omitted).

Accord, United States v. Silver, 457 F.2d 1217 (3d Cir. 1971); Perry v. United States, 422 F.2d 697 (D.C. Cir. 1969); United States v. Harris, 388 F.2d 373 (7th Cir. 1967).

If an insufficient supplemental charge necessitates reversal, so should a supplemental charge that gives no illumination to two vital questions. Because of the importance of this question to the administration of criminal justice in the federal courts, and in order to rule on the continuing vitality vel non of the Bollenbach line of cases, this Court should grant the writ to review the judgment below.

3. THE DECISION BELOW RAISES IMPORTANT QUESTIONS OF THE SCOPE OF PROPER ARGUMENT BY A PROSECUTOR.

In his closing argument to the jury, the attorney for the Government made the following comments:

> "We're not arguing that [Petitioner] has never committed these crimes before. What Mr. Gerash is telling you is that he has never been caught before, so set him free on the first time he is caught. And, of course, he will argue that to the next jury, if there is another jury. Well, [Petitioner] has never been caught before, so you should set him free again. Right. Because if nothing happens here, if he were not convicted here, it's as if he's never been caught before. Do we let the person, the murderer, kill one for free? Do we let the hijacker steal one airplane for nothing because --" (Record for Appeal, Supp. vol. I, p. 31.)

After objection by Petitioner's counsel, the trial judge instructed the jury that neither a murder case nor a hijacking were being tried, but rather the single-count indictment before them. However, later in that same argument, Government counsel stated:

> "When [Petitioner] has already lied to you about giving pills to Mr. Brophy; when he's already lied to you about the number of times he met with Agent Allen; when he's already lied to you several times in his testimony, how can you believe him?" (Record on Appeal, Supp. vol. I, p. 33.)

In his brief below and in oral argument, counsel for the Government admitted that such comments were improper, but he urged that they were proper "in context." Petitioner asserted below that nothing that had been said by his counsel could properly be considered to have provoked the above comments. The Tenth Circuit did not address this issue other than to comment that it was one of several without merit. See p. 10 of Appendix hereto.

This Court has previously stated the duties of a U.S. Attorney and the standards by which he is to be

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judged:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935).

Several courts of appeals have condemned comments such as those made by counsel for the Government herein. In United States v. Schartner, 426 F.2d 470 (3d Cir. 1970), the Government attorney stated:

> "I say to you with all the sincerity I can muster that if you do not convict the defendant the guilty will escape."

The Third Circuit there reversed the conviction, not only because the remarks implied a personal belief in the defendant's guilt, but also because the jury was asked to rely on the Government attorney's experience in prosecuting criminal cases. Similarly, in United States v. Fullmer, 457 F.2d 447 (7th Cir. 1972), the Seventh Circuit reversed a conviction because of the U.S. Attorney's remarks about other crimes, specifically snipings

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and other disturbances caused by weapons. In United States v. Cummings, 468 F.2d 274 (9th Cir. 1972), the Ninth Circuit condemned an "astonishing performance" by the U.S. attorney who had commented on the "checks and balances" in the U.S. Attorney's office. The court there said:

> "Its purpose could only have been to persuade the jury to convict, regardless of how weak the government's evidence might be; to persuade the jury that the defendant must be guilty, else he would never have been indicted. After such an argument, where is the presumption of innocence, where the requirement that the jury consider only the evidence in the case, where the government's burden to prove its case beyond a reasonable doubt? We have difficulty imagining an argument less proper or more surely prejudicial." 468 F.2d at 278.

Accord, Hall v. United States, 419 F.2d 582 (5th Cir. 1969); United States v. Lamerson, 457 F.2d (5th Cir. 1972); United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969); United States v. Dellinger, 472 F.2d 340, 389-391 (7th Cir. 1972); Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960).

In order to determine this vital question of the scope of proper closing argument by the U.S. attorney, a question which by the number of cases reported is evidently constantly recurring, this Court should grant the writ to review the judgment below.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SEPTEMBER TERM, 1973

UNITED STATES OF AMERICA, Plaintiff-Appellee	)	
v.	)	No. 73-1337
JOHN E. TEST, Defendant-Appellant	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(District Court No. 72-CR-352)

James L. Treece, United States Attorney, and J. Terry Wiggins, Assistant United States Attorney, Denver, Colorado, for Appellee

Louis M. Fischer, Denver, Colorado and Walter L. Gerash, Denver, Colorado, for Appellant

Before CLARK*, Associate Justice; SETH and McWILLIAMS, Circuit Judges.

* Associate Justice, United States Supreme Court, Retired, sitting by designation.

PER CURIAM

Appellant John E. Test was convicted by a jury on a one count indictment charging him with knowingly and intentionally distributing a controlled substance, to wit: Lysergic acid diethylamide (LSD) in violation of 21 U.S.C. § 841.[1] On this appeal Test presents several questions but only two have substance, i.e., (1) Was Test entrapped as a matter of law and (2) Did he have the specific intent required by the statute. We have concluded that neither point has merit and, therefore, affirm the conviction.

1. Facts and Circumstances:

John Test first met Peter Brophy, the Government informer, in October, 1971, as a customer at Brophy's fish market, Seafood Limited, located in the Happy Canyon Shopping Center in Denver, Colorado. During the next several months Test and Brophy developed a friendship. Test performed odd jobs at Seafood Limited and he and Brophy drank beer together occasionally; Test was invited to Brophy's home and met his wife. It appears that at various unspecified times Brophy told Test that he had prior dealings in smuggling marijuana from Mexico to California, that he was a pilot and had used a plane to bring the contraband into the United States, and that he had invested his illegal profits in Seafood, Limited. None of Brophy's accounts of his trafficking in illicit drugs was true.

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By February 24, 1972, the relationship having continued, Brophy told Test that he would like to have a few tablets to give some friends; and Test obligingly produced seven tablets in a tinfoil packet which he said were "probably mescaline and acid." Brophy turned the tablets over to Agents Ercole and Lochridge of the Bureau of Narcotics and Dangerous Drugs; and a laboratory test revealed that they were LSD cut by a large amount of stearic acid. Test denied giving the tablets to Brophy. On March 13, 1972 Brophy called Agent Allen of the Bureau and arranged for Allen to come to Seafood Limited to meet Test. Neither Brophy nor Test had met Allen previously. Allen posed as Tom Stone, a ski instructor at Aspen and former associate of Brophy in the drug traffic in California. Allen testified that he told Test that he wanted to buy some cocaine and that Test told him "he had a connection for cocaine who could sell pound quantities . . ." quoting a price of $11,000 per pound. They discussed the purchase of approximately two to five pounds. In addition Test said he "could supply . . . marijuana, hashish, LSD and amphetamines." No sale or distribution was made at this meeting.

A second meeting between Agent Allen and Test occurred on March 15, 1972. While Brophy's part in the meeting is somewhat hazy, it appears that he overheard "a lot of the talk" but was not an active participant. Test told Allen that "there would be a delay in the delivery of the cocaine" but that "he had been successful in reducing the price of cocaine from

$31,000 to $10,000 and that he "had access to 10 pounds of marijuana which he would be willing to sell for $[illegible] a pound." As to cocaine, the two discussed a purchase price of $32,000 for four pounds. Apparently both parties then endeavored to make a showing of good faith. Agent Allen displayed $35,000 in Government funds (Test claimed it was $50,000) in the trunk of his car. Test gave Allen a marijuana cigarette saying that he hoped he enjoyed smoking it. When it became apparent, however, that Test could not produce any cocaine, Allen said: "I have to show my people something" and asked Test "if he could get any other substances." Test replied "that he might be able to get him some mescaline."

Subsequently, on March 27, 1972, Brophy contacted Agent Allen to set up a meeting for the purchase of 1,000 tablets of what was alleged to be mescaline. Allen met Test the next day at Seafood Limited. The sale was made inside a Government car parked in the shopping center parking lot. Allen paid Test $450 and received approximately 1000 tablets in a plastic bag. Test told Allen that the tablets "were stamped out by his friends" and that "he could get 50,000 tablets more." He testified that he had purchased the tablets two days earlier from two friends in Pine, Colorado paying $400 for them and leaving him a $50 profit on the deal.

Agent Allen testified that when he purchased the tablets, he believed them to be LSD. "Most of the drugs," he said, "that we have encountered that have been referred to as, chocolate mescaline as they were called, in fact turned out to be LSD." Subsequent laboratory analysis of the actual

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1,000 tablets established that they contained LSD cut by phencyclidine (PCP). The Government's expert witness, Mr. Ruyle, a forensic chemist with the Bureau of Narcotics and Dangerous Drugs, testified at the trial that he had analyzed more than five hundred separate samples of drugs denoted as mescaline but that they normally did not contain mescaline but were usually LSD by itself, PCP by itself, or LSD cut by PCP. He stated that PCP was a normal cutting agent for LSD.

2. Entrapment

Test asserts that he was unquestionably entrapped as a matter of law and should, therefore, have been acquitted. His claim is based on Brophy's alleged exploitation of their friendship to set him up for the drug deal with Agent Allen, Brophy's false stories of his prior drug exploits, his introduction of Agent Allen under false pretenses, Agent Allen's repeated requests for the production of drugs, and his showing of a large sum of money despite the fact that Brophy and Allen knew Test had no prior criminal record but kept after him on the theory that he might have known some large drug traffickers.

Entrapment is a "relatively limited defense." United States v. Russell, 411 U.S. 423 (1973). Entrapment as a matter of law is the more limited in terms of its availability. It is rudimentary that entrapment as a matter of law can only be found where it appears unmistakably clear to the [illegible] evidence establishes that the criminal design

originated with Government agents, was the product of their creative activity and was implanted in the mind of an otherwise innocent person totally lacking the requisite predisposition to commit the crime. Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958).

In Sorrells, supra, the Supreme Court stated that when a defendant claims entrapment:

> "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." 287 U.S. at 451, 452.

In line with this concept, this court has exhaustively scrutinized the record examining the conduct of informer Brophy, of Special Agent Allen as well as the conduct and predisposition of Test. Construing the evidence in the light most favorable to the Government, as we are required to do, Glasser v. United States, 315 U.S. 60, 80 (1942), we are not persuaded that the conduct of the Government's agent and informer was so improper, overzealous or otherwise offensive as to amount to entrapment as a matter of law. As the Supreme Court said in United States v. Russell, supra: "Sorrells and Sherman both recognize 'that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution,' 287 U.S., at 441; 356 U.S., at 372. Nor will the mere fact of deceit defeat a prosecution, see, e.g., Lewis

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v. United States, 385 U.S. 206, 208-209 (1966), for there are circumstances when the use of deceit is the only practicable law enforcement technique available." At 435-436.

Here, Test contends he was tricked and enticed by his friend Brophy -- their friendship exploited. There is no evidence in the record which conclusively establishes that Brophy was a paid Government informer when he first met Test. Nevertheless it is true that Test's friendship with Brophy had a bearing on Test's delivery of the seven tablets on February 24,1972 However, Test was not indicted or convicted for this distribution. Brophy did utilize his friendship with Test to introduce him to Agent Allen but thereafter played a decidedly unobtrusive role in the course of events leading up to Test's transaction with Agent Allen on March 28th. Neither this mere introduction nor his actions as a go-between for Allen and Test in arranging their meetings rises to the level of entrapment as a matter of law. Nor can Test successfully argue that his friendship with Brophy had such a compelling spillover effect on him vis-a-vis his relationship with Agent Allen that he was rendered powerless to distinguish between right and wrong or to refuse to cooperate with Agent Allen. Allen's requests for the production of drugs are a judicially acceptable tactic especially since the solicitations involved here were met with very little, if any, firm reluctance on Test's part. Furthermore, there is no evidence that Allen

threatened, cajoled or "sweated" Test. Indeed, Test volunteered extensive information about his drug connections, what types and quantities of drugs were available and presented Allen with various options and alternatives. Nor was Agent Allen's display of cash a fatal flaw in the case when viewed in the context of the negotiations at that point. It was merely a showing of good faith. Test's quid pro quo was the gift of a marijuana cigarette. Finally, all the evidence concerning Test's continuous pattern of illicit drug activities and his state of mind as revealed by his highly significant admissions at the trial is convincing proof that he was no cats-paw for Brophy but was in reality a drug trafficker. He fails to qualify as the "unwary innocent" victimized by a pernicious criminal scheme wholly manufactured by law enforcement officers. Sherman v. United States, supra, at 372. His lack of a prior criminal record, contrary to his claim, is not exculpatory.

Although the trial judge found, and we agree, that there was no entrapment as a matter of law in this case, the Government, citing Martinez v. United States, 373 F. 2d 810 (10th Cir. 1967), contends that Test was not entitled to have the entrapment issue submitted to the jury because he pled not guilty to the offense charged. Whether or not this be so as a general rule, [2] a matter we do not reach, it is clear that the Government's case here was in no wise prejudiced by the submission because the jury found with the Government.

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3. Specific Intent

Test's second line of defense is that he lacked the specific intent required by the statute to commit the offense for which he was convicted. He claims a judgment of acquittal should have been entered on the grounds that he did not knowingly and intentionally distribute LSD, "although he may have had the intent to distribute mescaline." At the trial Test testified that he told Agent Allen that he "might be able to get him some mescaline," that subsequently he "purchased the mescaline" for $400, that he sampled the tablets to be sure they were not LSD, and that he dispensed over one thousand tablets to Agent Allen on March 28, 1972, two days after he purchased them, for $450. He stated he knew LSD was illegal but "wasn't sure" about mescaline.

Unquestionably it is the province of the jury to pass upon guilt or innocence. Sinclair v. United States, 279 U.S. 749, 765 (1929). Where, as here, an essential element of the offense charged is the specific intent to commit it, the issue of intent is to be submitted to the jury. Screws v. United States, 325 U.S. 91, 106-107 (1945). Whether or not Test knew the character of the substance he was distributing or that his distribution was an illegal act is not for this court to say. It is the jury's function and duty to weigh the conflicting evidence and draw reasonable inferences therefrom in reaching its judgment. And any claimed ignorance of the law on Test's part is no excuse. United States v. International Minerals & Chemical Corporation, 402 U.S. 558 (1971).

We believe there was substantial credible evidence before the jury, both direct and demonstrative, from which it could justly reach its verdict, and we are bound to sustain it. Glasser v. United States, supra, at 80. To hold otherwise would precipitate a headon collision with the Seventh Amendment. U. S. CONST. amend. VII, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., et al., 369 U.S. 355 (1962).

We have closely examined appellant's other contentions and find no merit in them. Accordingly, the judgment of conviction is affirmed.

Affirmed

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Footnotes

/1 21 U.S.C. § 841 provides in pertinent part:

> "(a) Unlawful acts.
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally---
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance".

21 U.S.C. § 812 specifies that Lysergic acid diethylamide is a Schedule I controlled substance.

/2 See, Sorrells v. United States, 287 U.S. at 439, 451-452.

28 § 1867

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(c)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both. As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54.

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STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

"EXHIBIT A"

WALTER K. GERASH, being first duly sworn upon oath, deposes and says:

On November 8, 1972, in the District Court in and for the County of Boulder, State of Colorado, in the case entitled People of the State of Colorado v. Florencio J. Granado, Criminal Action No. 5738, an all-day hearing was conducted. This hearing was based on a motion to quash the petit jury panel on the grounds that the voter registration lists plan of selecting jurors systematically excludes persons with Spanish surnames, youths under 30, students and workers. Prior to the hearing the District Attorney conceded the inspection of the qualified jury list.

At the hearing witness Marcela Trujillo, an expert in romance languages, identified a certain amount of Spanish surnames from the 8,000 qualified jury list. She testified that from the 8,000 there were 150 with Spanish surnames.

The 1970 U. S. Bureau of the Census figures disclosed that Chicanos 18 and over represent 5.42 percent of the total population of people in the age group in Boulder County. Those 21 and older made up 5.34 percent of the total population.

Then witness George Bardwell, a mathematician from the University of Denver, testified that the percentage of Chicanos on the jury list of 8,000 was 1.92 percent. Professor Bardwell said that the probability of 1.92 percent occurring by chance was as unlikely as getting six straight royal flush hands in poker. The mathematician further testified

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that people 18 to 30 years of age represented 33.30 percent of the total population of Boulder County while these people 20 to 30 years of age constituted 31.7 percent, according to the United States Census. However, the number of people in the 20 to 30 age group represented only 17.5 percent of the jury list. If jury members were truly selected at random, Professor Bardwell testified, that one can reasonably expect figures of 30.9 and 45.3 percent between 18 and 30.

These scientific findings have statistically exposed the voter registration lists as being unrepresentative of the defendant's peers. This is the voter registration list system used by the present plan of the United States District Court for the District of Colorado. There is probable cause to believe that there is the same systematic exclusion in the United States District Court and a hearing should forthwith be held after the qualified list is given to defendant's attorney for inspection so that a full fair hearing can be held.

The presiding judge also felt that there is systematic exclusion but denied the relief because the Supreme Court of Colorado stated that the voter registration list system should continue a year and refused to give full force and effect the existing legislation that called for supplementing the voter registration lists with other lists by March of 1972.

Walter L. Gerash

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STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

Subscribed and sworn to before me this 28th day of December, 1977, by Walter L. Grande.

My commission expires: 6/10/75

Notary Public

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